

April 24, 2012

DEVELOPMENT AGREEMENT

May __, 2012

This Agreement dated as of May __, 2012, is entered into by and between the Town of Wenham, acting by and through its Board of Selectmen ("Wenham") and James X. Mullen with an address of _____ ("Mullen").

RECITALS

Mullen has asked Wenham to consider amending the Wenham Zoning By-law ("Zoning By-law") by adopting Article 17, "Independent Living Overlay District (ILOD) pursuant to G.L. Chapter 40A, a copy of which is attached as **Exhibit A**, at a Town Meeting to be held May 5, 2012 ("Town Meeting") and to include in the ILOD a parcel of land consisting of approximately 50 acres, more or less, (the "Property") owned by James X. Mullen, further described in **Exhibit B** attached hereto. The adoption of the ILOD and the inclusion of the Property within the ILOD would enable Mullen to apply to the Wenham Planning Board ("SPGA") for a special permit for development of an Independent Living Facility ("ILF") on the Property.

AGREEMENT

Now, therefore, for mutual consideration, the receipt and sufficiency of which are hereby acknowledged, Wenham and Mullen agree that, if, and only if, the ILOD is adopted at the Town Meeting in the form attached hereto as **Exhibit A**, without modification which materially affects Mullen's rights as set forth herein and Mullen applies for and is granted a special permit for not less than 238 dwelling units, on terms and conditions satisfactory to him, and a building permit for an ILF as described in the ILOD, then Mullen and Wenham shall each perform the actions as set forth herein; provided, however, that with respect to the actions described in Section A.1, Mullen shall perform its obligations regardless of the action of such Town Meeting, or the status of any building permit application.

A. ENGAGEMENT OF CONSULTANTS; REIMBURSEMENT FOR COSTS

1. Payment of Consultants and Special Legal Counsel during the Rezoning Process. Within thirty (30) days of the execution of this Agreement, Mullen agrees to replenish the existing escrow account(s) in the office of the Wenham Town Treasurer in an amount sufficient to pay for all documented costs of Wenham's consultants and special legal counsel in the rezoning process up to and including the conclusion of the Town Meeting at which the ILOD is considered.

2. Payment for Review of Plan. At the time of the submittal of the application for the special permit required by the ILOD, Mullen shall deposit with the Wenham Town Treasurer the amount of \$10,000 (the "Special Permit Escrow Account") which shall be used pursuant to G.L.c. 44, §53G by the SPGA to engage a traffic engineer, civil engineer, attorney, landscape architect, architect, urban designer, and other reasonably necessary consultants to provide technical assistance during the review of said application at a mutually agreeable scope and price. The Special Permit Escrow Account shall be replenished by Mullen at the request of the SPGA when the balance falls to \$5,000.00. The Planning Board shall make a good faith effort to select those consultants already engaged pursuant to Paragraph A.1, above, to minimize expense.

3. Payment for Review of Plans and Documents Before and during Construction. At the time Mullen submits its first application for a building permit with respect to the ILF, Mullen shall deposit with the Wenham Town Treasurer the amount of \$10,000, (the "Construction Escrow Account") which shall be used pursuant to G.L.c. 44, § 53G by Wenham to engage a landscape architect, architect, code consultant, building inspector, civil engineer, wastewater engineer, wetlands specialist, traffic engineer, attorney, fire protection engineer, structural engineer, and/or other reasonably necessary consultants to provide technical assistance and inspections before and during the construction of the ILF at a mutually agreeable scope and price. Such account shall be used to pay for reasonably necessary outside consultant costs and expenses associated with document or plan review and inspections required by the SPGA, Building Commissioner, Board of Selectmen, Road Commissioners, Fire Department, Police Department, Conservation Commission, and Board of Health to review building permit applications and to conduct conformance review during and following the completion of construction in connection with the development of the ILF. The Planning Board shall make a good faith effort to select those consultants already engaged pursuant to Paragraph A.1, above, to minimize expense.

B. PROJECT DESIGN

1. Aggregate Limits. Mullen's application for a special permit for an ILF shall propose a Project with the following aggregate limits:

A. not more than 238 independent, for sale dwelling units, not less than 80% of such units containing only two bedrooms, and none more than three bedrooms;

B. Ancillary structures, amenities and services, including without limitation three staff apartments, five hotel rooms for owner/occupant guests only, restaurant for owner/occupants and their guests, swimming pool, health, fitness, and medical services and equipment.

2. Underground Utilities. Mullen shall install all utilities serving the ILF underground, including, but not limited to, water, sewer, gas, electric, telephone/teledata, and cable, unless cost prohibitive due to ledge, wetlands, etc, or already existing aboveground. All new utility installations shall be single meter, unless otherwise prohibited by law.

C. OPEN SPACE AND TRAIL SYSTEM

1. Trails. Prior to the issuance of the 151st certificate of occupancy, Mullen shall design and install a trail or pathway which connects to Grapevine Road, substantially in accordance with the sketch plan attached as **Exhibit C.**

D. SITE SERVICES

Mullen shall be solely responsible for the maintenance and operation, including but not limited to refuse and trash removal, snow removal, road, emergency access, and sidewalk maintenance, lighting, landscape maintenance and similar aspects of the ILF to be built within the limits of the Property. This provision shall be reiterated in the master deed for the ILF.

E. PUBLIC SAFETY

1. Fire Suppression Plans. Mullen shall prepare and submit detailed fire suppression and detection plans for review by an independent fire protection engineer selected by the Wenham Fire Department, with the cost of this review paid by Mullen via an escrow account with an agreed upon amount to be funded by Mullen as set forth in Section A.2 of this Agreement.

2. Alarms. Each building built as part of the ILF shall contain an alarm for smoke or fire detection connected to the Fire District via either a fire alarm signal wire or via wireless technology, as shall be determined by the Fire District.

3. Construction Phase. Mullen shall be responsible for site security during construction, by ensuring that locked gates are maintained at the vehicular entrances to the property. Mullen shall pay for public safety details when required during the construction period when site equipment and material deliveries affect public roadways adjacent to the Property.

F. AFFORDABLE HOUSING

1. Schedule. Mullen has indicated an intent to provide the Affordable Dwelling Units required by Section 12.5.10 of the Wenham Zoning By-Laws by providing off-site rental housing equal to 15% of the total number of on-site units provided that 100% of such off-site units shall be counted on the DHCD's Subsidized Housing Inventory. Such indication shall not limit Mullen's rights to develop for sale housing as set forth in Section 12.5.10. In order to secure Mullen's performance in this regard, Mullen shall adhere to the following schedule:

- a. Prior to the formal submittal of an application for a special permit to the Planning Board, Mullen shall identify a mutually acceptable property under it/his or a related entity's control, and provide proof of such control (e.g., a binding Offer to Purchase or Purchase & Sale Agreement).
- b. Prior to the submittal of an application for any building permit, Mullen shall submit proof to the Planning Board and the Building Inspector that an application for a comprehensive permit has been submitted by it or a related entity to the Wenham Zoning Board of Appeals.
- c. Prior to the issuance of the 101st certificate of occupancy, Mullen or a related entity, shall obtain a comprehensive permit from the Wenham Zoning Board of Appeals. Prior to the issuance of the 101st certificate of occupancy, Mullen shall prepare a deed to be held in escrow for one (\$1.00) dollar to the Town for the land on which the Affordable Dwelling Units shall be located, and an agreement to transfer the comprehensive permit. The comprehensive permit shall contain definitive construction-ready civil engineering for proposed stormwater management facilities and the proposed wastewater disposal facility, which shall be designed to treat wastewater for a minimum of eighty (80) bedrooms, each generating 110 gallons per day of flow. The deed and the permit shall be held in escrow by an agent selected by the Town. The escrow agent shall be instructed to convey the deed in escrow to the Town if Mullen does not make adequate progress, at the sole discretion of the Town, toward the construction of the Affordable Dwelling Units.

2. Appeal. In the event a person aggrieved appeals the issuance of Mullen's comprehensive permit, the Board of Selectmen may waive Section F.1.d, above.

G. MITIGATION

1. **Payment.** Prior to the issuance of the 151st certificate of occupancy and the issuance of all certificates of occupancy thereafter, Mullen shall contribute the sum of Five Thousand (\$5,000.00) Dollars per bedroom to the Town of Wenham, pursuant to G.L. c. 44, s. 53A.

H. MISCELLANEOUS PROVISIONS

1. **Invalidity.** Mullen and Wenham agree that if the Town's adoption of the proposed ILOD is determined to be invalid, illegal, or unconstitutional by the Attorney General of the Commonwealth of Massachusetts or by a court of competent jurisdiction prior to the performing of the actions described herein, then the provisions of this Agreement and each of the agreements and documents referenced herein shall be null and void; provided, however, that the provisions of Section A.1 shall survive any such determination and shall continue to be in full force and effect.

2. Compliance. Mullen agrees that during the special permit process it shall submit all necessary evidence, to the satisfaction of the SPGA, to show compliance with the terms of this Agreement.

3. Intent to Bind Successors, Heirs and Assigns. The foregoing obligations shall run with the land now owned by Mullen in Wenham, Massachusetts and shall be binding upon and inure to the benefit and burden of Mullen, its heirs, successors, and assigns. This Agreement shall be recorded with the Essex South District Registry of Deeds.

4. Effect; Amendment. This Agreement shall not take effect until voted and executed by the Board of Selectmen of the Town of Wenham. Upon such vote, this Agreement shall not be amended in any material respect except by a further majority vote of the Board of Selectmen, and with the express written agreement of Mullen.

5. Sale to Tax Exempt Entity. Mullen understands that the Town supports this Agreement, in part, due to the fact that the proposed development of the Property will generate significant revenue benefiting the Town, including without limitation, real property tax revenue. In order to assure the Town of the continuation of such revenue in an amount proportional to the tax revenue anticipated from the Property, in the event the Property is sold to an entity or organization that is exempt from paying local real property taxes after the issuance of the first certificate of occupancy, Mullen, on behalf of its heirs, successors, and assigns, hereby agrees that such exempt organization shall, on the first business day of January, make an annual payment to Wenham of Five Hundred Thousand (\$500,000.00) Dollars, the receipt of which shall be Wenham's sole remedy against Mullen and such exempt organization under this Agreement, at law or in equity. Said sum shall escalate annually based upon the United States Department of Commerce's Implicit Price Deflator for State and Local Governments or an alternative mutually agreed upon indicator. Such payments shall continue for as long as the Subject Property is owned by entity or organization that is exempt from paying local real property taxes. Upon James X. Mullen's conveyance to such exempt entity or organization, James X. Mullen shall have no further liability with regard to this condition.

6. Required Notice. Unless otherwise specified in this Agreement, any notice to be given under this Agreement shall be in writing and signed by the party (or the party's attorney) and shall be deemed to have been given (a) when delivered, if delivered by hand, or (b) two business days after the date mailed, if mailed by registered or certified mail, all charges prepaid, in either event addressed as follows:

In the case of the Town, to:

Town Administrator
Town Hall
Wenham, MA

In the case of the Mullen, to:

James X. Mullen
Wenham, MA

By such notice, either party (or such party's attorney) may specify a new address, which thereafter shall be used for subsequent notices.

7. Default and Notice.

A. *By Mullen.* If Mullen shall default in the performance of any term, covenant or condition of this Agreement, which default shall continue for more than sixty(60)days after written notice to Mullen (or if such default shall be reasonably expected to take more than sixty(60) days to cure, said longer period of time), Wenham shall have the right to (i) terminate this Agreement; (ii) withhold any approvals issued by Wenham; or (iii) exercise any other remedy available at law or in equity, including commencing an action for specific performance. Wenham agrees that if, within ten (10) days after Mullen's receipt of a notice of a claim of default, Mullen shall give notice to Wenham that Mullen contests the same, then Wenham shall not have the right to exercise any of the foregoing rights in respect thereto until such claim shall have been finally adjudicated in such contest. Mullen agrees to diligently prosecute any such contest and if such adjudication is in favor of Wenham Mullen shall have thirty (30) days (or such longer period of time as shall be reasonable under the circumstances) to effect such cure and in addition thereto, Mullen shall reimburse Wenham its reasonable legal fees and other expenses in defending any such contest.

B. *By Wenham.* If Wenham shall default in the performance of any term, covenant or condition of this Agreement, which default shall continue for more than thirty (30) days after written notice to Wenham (or if such default shall be reasonably expected to take more than thirty (30) days to cure, said longer period of time), Mullen shall have the right to (i) terminate this Agreement; or (ii) exercise any other remedy available at law or in equity, including commencing an action for specific performance.

8. Effective Date of Agreement. This Agreement shall be effective as of the date it shall be executed by both Mullen and Wenham.

9. Dispute Resolution. Prior to the initiation of any court proceeding regarding the terms of this Agreement or performance thereunder, Wenham and Mullen agree that such disputes shall be first subject to mediation and then binding arbitration for a period not longer than ninety (90) days. Each party shall pay its own legal fees and costs.

10. Applicable Law; Construction.

A. This Agreement shall be deemed to have been executed within the Commonwealth of Massachusetts, and the rights and obligations of the parties hereto shall be construed and enforced in accordance with, and governed by, the laws of the Commonwealth of Massachusetts.

B. This Agreement is the entire agreement among the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written agreements and discussions.

Executed under seal as of the date first above written.

TOWN OF WENHAM

By: _____
Selectman _____, Chairman

By: _____
Selectman _____

By: _____
Selectman _____

By: _____
Selectman _____

By: _____
Selectman _____

JAMES X. MULLEN

SCHEDULE OF EXHIBITS

Exhibit A ILOD

Exhibit B Property Description

Exhibit C Trail/Pathway Sketch